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No. 96-725

In the Supreme Court of the United States

OCTOBER TERM, 1996

TRIDENT SEAFOODS CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Fed. R. Civ. P. 68 operates to shift attorneys' fees in an enforcement action reasonably brought by the United States under Section 113 of the Clean Air Act, 42 U.S.C. 7413.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 92 F.3d 855. The order of the district court (Pet. App. 21a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1996. The petition for a writ of certiorari was filed on November 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (Act) requires the Environmental Protection Agency (EPA) to prescribe Na-

tional Emission Standards for Hazardous Air Pollutants (NESHAP) at levels providing an ample margin of safety to protect public health. 42 U.S.C. 7412(c). The EPA establishes reporting requirements for owners and operators of emissions sources subject to regulation under the Act. 42 U.S.C. 7414(a). Owners and operators that intend to renovate a facility involving the stripping or removal of certain asbestos materials are required to provide the EPA with a timely, advance, written notice of intent to renovate a facility. 40 C.F.R. 61.145, 61.146. A violation of that notice requirement is a violation of the Clean Air Act. 42 U.S.C. 7412(e)(5). Section 113 of the Act authorizes the EPA to bring enforcement actions for civil penalties and injunctive relief to remedy violations of the Act. 42 U.S.C. 7413.

2. Petitioner is a seafood processing corporation that, in May 1988, began renovating an abandoned fish cannery in Anacortes, Washington. Pet. App. 2a. The renovation included the removal of asbestos insulation. Petitioner hired a general contractor, James Hinton, who subcontracted with a friend, Thomas Stakkeland, to conduct the work. Over the course of five days in August and September 1988, Stakkeland, who was not certified at the time to remove asbestos, performed renovation work involving asbestos. Stakkeland's 11-year-old son, who had no prior experience in asbestos removal, assisted in the work. After the work was supposedly completed, at least five bags of asbestos were left at the facility. *Id.* at 2a-3a.

On September 26, 1988, an inspector for the state regulatory agency, the Northwest Air Pollution Control Authority (NWAPCA), learned of the asbestos removal. The state inspector subsequently inspected the facility and removed samples of the suspected

asbestos for analysis. The analysis revealed that all samples contained more than one percent asbestos. NWAPCA collected further samples, all of which tested positive for asbestos. On September 30, 1988, petitioner notified the State of its intent to remove asbestos from the Anacortes facility. In October, 1998, a consulting firm hired by petitioner disposed of the five remaining bags of asbestos. Petitioner eventually hired a new asbestos contractor who, on October 14, 1988, removed an additional 25 bags of asbestos. Pet. App. 3a. NWAPCA ultimately fined petitioner $250 for failing to notify the State of the planned asbestos abatement. *Ibid.*

In August 1989, the EPA served petitioner with a request for information regarding petitioner's asbestos removal activities. In April 1992, the Department of Justice informed petitioner that the asbestos removal activities had been referred to it for enforcement pursuant to Section 113 of the Clean Air Act, 42 U.S.C. 7413. The government also advised petitioner that it had the opportunity to settle the matter before the Department filed suit under Section 113. Pet. App. 4a. Ensuing negotiations did not result in settlement and, on June 29, 1992, the United States brought an action under Section 113 against petitioner, Stakkeland, and Hinton alleging one notice violation and four work practice violations of the Act. Pet. App. 4a-5a. On May 3, 1993, petitioner made an offer of judgment under Fed. R. Civ. P. 68, which included a $30,000 civil penalty and a consent decree agreeing to various abatement-related activities. Pet. App. 5a. On May 19, 1993, the United States rejected that offer. On July 3, 1993, petitioner made a second offer of judgment that was identical to the previous offer, except that petitioner offered to pay a $50,000 civil

penalty. The United States also rejected that offer. *Ibid.*

On July 22, 1993, the district court granted summary judgment in favor of the United States on the claim that petitioner unlawfully failed to provide notice of its asbestos removal, and the court set the remaining four work practice claims for trial. Pet. App. 5a-6a. Shortly before trial, the United States made a settlement offer of $125,000, which petitioner rejected. *Id.* at 6a. After trial, the jury returned a verdict in favor of petitioner on the work practice violations. The district court assessed a $65,000 penalty against petitioner for the notice violation. Petitioner appealed that assessment, and the Ninth Circuit reversed.[1] *Ibid.*; *United States* v. *Trident Seafoods Corp.*, 60 F.3d 556, 557 (1995). On remand, the district court imposed a penalty of $25,000 less the $250 previously paid. Pet. App. 6a.

3. On January 24, 1994, petitioner moved for an award of its costs and attorneys' fees pursuant to (1) Fed. R. Civ. P. 68[2]; (2) the Equal Access to Justice

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[1] The court of appeals held that the district court erred in finding that petitioner's notice violation was continuous. *United States* v. *Trident Seafoods Corp.*, 60 F.3d 556, 559 (1995). The court remanded to the district court to impose a fine of no more than the statutory maximum amount of $25,000 for a one-day violation of the Act. *Ibid.*

[2] Rule 68 provides, in relevant part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted,

Act (EAJA), 28 U.S.C. 2412(d)(1)(A)[3]; and (3) Section 113(b) of the Clean Air Act.[4] Pet. App. 21a. The district court granted petitioner's motion for costs, but denied petitioner's request for attorneys' fees. *Id.* at 21a-28a.

The court rejected petitioner's contention that it was entitled to an award of attorneys' fees under EAJA and the Clean Air Act because the government was unreasonable in bringing suit. Pet. App. 26a-27a. The court concluded that "[u]nder the facts of this case and given the clear dictates of the law," the government was reasonable "in going to trial." *Id.* at 27a. The court also rejected petitioner's claim that Fed. R. Civ. P. 68 required an award of attorneys' fees, because petitioner's offer of judgment exceeded

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> either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.*

Fed. R. Civ. P. 68 (emphasis added).

[3] 28 U.S.C. 2412(d)(1)(A) provides, that, except as otherwise specifically provided by statute, fees shall be awarded to a prevailing party other than the United States in an action brought by or against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

[4] Section 113(b) of the Act provides that "[i]n the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable." 42 U.S.C. 7413(b).

the government's recovery at trial. Pet. App. 22a-26a. The court reasoned that "Rule 68 * * * does not apply to the United States as the plaintiff in an action brought under the Clean Air Act. The basis for awarding attorneys' fees has been laid out by Congress in the Clean Air Act, and will not be expanded here." Pet. App. 26a.

Over the government's objection, the district court awarded petitioner its costs under EAJA, 28 U.S.C. 2412(a), which permits a prevailing party to recover the costs enumerated in 28 U.S.C. 1920. Pet. App. 27a-28a. Petitioner appealed the denial of attorneys' fees, and the government appealed the award of costs. *Id.* at 2a.

4. The court of appeals affirmed the district court's decision denying petitioner's request for attorneys' fees. Pet. App. 2a-14a.[5] The court of appeals observed that, under this Court's decision in *Marek* v. *Chesny*, 473 U.S. 1 (1985), "[t]he term 'costs' in Rule 68 is intended to refer to all costs properly awardable under the relevant substantive statute." Pet. App. 8a. Noting that "[t]he Clean Air Act indicates that Congress did not intend to award attorneys' fees unless the action was unreasonable," the court concluded that "[t]he only interpretation that gives meaning to every word in both Rule 68 and the Clean Air Act is the 'costs' in Rule 68 include attorneys' fees only if the action was unreasonable." *Id.* at 8a-9a.

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[5] The court of appeals also affirmed the district court's award of costs under EAJA. Pet. 14a-20a. The court of appeals rejected the government's contention that costs could not be awarded against the government unless the government was found to have been unreasonable under Section 113 of the Clean Air Act. Pet. App. 17a-19a. That issue is not before the Court.

The court found unpersuasive petitioner's contention that limiting Rule 68 fee awards to only those fees allowable under Section 113(b) would deprive Rule 68 of "any independent operative force." Pet. App. 9a. The court explained that "Rule 68 is not intended to expand the bases for recovery of attorneys' fees." *Ibid.* The court also reasoned that its interpretation of Rule 68 would continue to "force the government to scrutinize more closely the reasonableness of its action when faced with an offer of judgment," because "[i]f the government concludes that the court is likely to find that the action is unreasonable, the offer of judgment is more likely to be accepted." *Ibid.*

The court also upheld the district court's finding that the government was reasonable in bringing the action against petitioner under the Clean Air Act.[6] Pet. App. 12a-14a. After reviewing the evidence, the court concluded that "although the government may not deserve commendation for the manner in which the action was maintained, its legal and factual foundation cannot reasonably be disputed." *Id.* at 13a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

The court of appeals correctly determined that in an action brought by the government under Section 113 of the Clean Air Act, a defendant is not entitled to

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[6] The court did not consider the reasonableness of the government's conduct prior to filing the action. Pet. App. 12a n.4. That question is not before the Court.

attorneys' fees under Rule 68, unless that action is unreasonable. This Court in *Marek* v. *Chesny*, 473 U.S. 1 (1985), held that "costs" subject to shifting under Rule 68 include attorneys' fees only "where the underlying statute defines 'costs' to include attorney's fees." 473 U.S. at 9. The Court explained that "Rule 68 does not come with a definition of costs" but "rather * * * incorporates the definition of costs that otherwise applies to the case." *Id.* at 9-10 n.2. Thus, Rule 68 shifts attorneys' fees to the rejecting offeree only if those fees are "properly awardable under the relevant substantive statute." *Id.* at 9.

Petitioner contends that, because Section 113 defines "costs" awardable under that Section to include attorneys' fees, "such fees are subject to the cost-shifting provision of Rule 68." Pet. 10 (quoting *Marek*, 473 U.S. at 9). That argument, however, ignores the express limitation in Section 113 that those fees are awardable against the government only if the government's "action was unreasonable." 42 U.S.C. 7413(b). That limited waiver of sovereign immunity is strictly construed. See *United States* v. *Idaho*, 508 U.S. 1, 7 (1993); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

Petitioner concedes that the courts of appeals are "in accord" that "attorney fees [a]re not subject to Rule 68 unless the substantive requirements of the underlying statute [a]re satisfied." Pet. 9 n.6 (collecting cases). Nor does petitioner challenge the court of appeals' ruling (Pet. App. 13a) that the government's action under Section 113 of the Clean Air Act "cannot reasonably be disputed." See Pet. 6 n.5. Accordingly, the court of appeals was correct in concluding that petitioner's attorneys' fees are not within the scope of

Rule 68, because those fees are not "properly awardable" under Section 113.

Petitioner also argues (Pet. 7) that the court of appeals' decision "renders Rule 68 completely inoperative" and "frustrates" the settlement purposes of Rule 68, because a Rule 68 defendant can never recover attorneys' fees unless the defendant is already entitled to those fees under Section 113 of the Clean Air Act. As the court of appeals explained, however, when the government is faced with a Rule 68 offer of judgment in an action under the Clean Air Act, it must "scrutinize more closely the reasonableness of its action" before declining an offer of judgment before trial. Pet. App. 9a. Thus, Rule 68 does have force in actions brought under Section 113 of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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